FILED

DEC 10 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Abruska v. Northland Vessel, No. 06-35932
WALLACE, Senior Circuit Judge, dissenting:

I conclude that the district court's summary judgment is not reversible on either the issue of common-law negligence or negligence *per se*, and therefore respectfully dissent.

Prior to 1972, a longshoreman injured while unloading a ship could recover directly from a shipowner, even if the condition that caused his injury was created by the stevedore. *See Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 164-65 (1981). When Congress amended the Longshore and Harbor Workers' Compensation Act (Act) in 1972, it "radically changed this scheme of things." *Id*. The amendments "substantially increased" the compensation payments an injured longshoreman could recover from the stevedore, while expressly limiting the shipowner's liability in section 905(b). *Id*. at 165.

Abruska has already recovered from the stevedore. To recover further, Abruska must demonstrate that his is an "exceptional case, under *Scindia*, in which the shipowner remains liable as a 'deep pocket' defendant, when it turns the vessel over to the stevedore for loading." *Bandeen v. United Carriers (Panama), Inc.*, 712 F.2d 1336, 1341 (9th Cir. 1983). The turnover duty of care requires a shipowner to,

> exercis[e] ordinary care under the circumstances to have the ship and its equipment in such condition that an <u>expert and experienced stevedore</u> will be

able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property . . . .

Scindia, 451 U.S. at 167 (emphasis added). As we explained in *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 1204, 1208 (9th Cir. 1989), the Supreme Court's choice of language "implies that certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around them." Therefore, to succeed on a claim against a shipowner, "the plaintiff must introduce evidence that the hazard was such that an expert and experienced stevedore would not be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property." *Id*. (quotation marks removed; citation omitted).

Abruska has not met his burden of proof on this issue. He presented no expert testimony as to whether a slack line would have been hazardous to an expert and experienced stevedore. The mere fact of Abruska's accident also does not meet the requirement given his inexperience. Because Abruska has failed to produce sufficient evidence, I would affirm the district court's summary judgment on this issue.

Although the issue is closer, I would also affirm the district court on the issue of negligence *per se*. Coast Guard regulations require unmanned cargo

vessels, like the Baranof Trader, to maintain three-course guardrails. 46 C.F.R. § 92.25-5. These regulations, however, provide an exception, whereby "rails of a lesser height or in some cases grab rails," are acceptable when it is "shown to the satisfaction of the Officer in Charge, Marine Inspection, that the installation of rails of such height will be unreasonable and impracticable, having regard to the business of the vessel." *Id.*

The majority contends that this exception only serves to excuse the height requirement of section 92.25-5, and does not allow for two-course railings. On September 25, 2000, however, the Officer in Charge signed a Certificate of Inspection which certified that the Baranof Trader was in compliance with all Coast Guard regulations. Under the text of the regulation, the only way for a vessel to simultaneously comply with section 92.25-5 and have only two rails, is to fall within the exception. Implicit in the officer's certification, then, was a determination that an additional rail would have been unreasonable and impracticable given the business of the Baranof Trader. Such a finding is consistent with the Marine Safety Manual, which provides "[t]he rail and deck guard requirements of 46 CFR 92.25 do not apply to unmanned deck cargo barges for ocean service." Therefore, I would also affirm the district court's summary judgment on the issue of negligence *per se*.